

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Appellee,*

*v.*

SHA'TON DAMIEN MURDOCK,  
*Appellant.*

No. 2 CA-CR 2018-0020  
Filed October 2, 2019

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
NOT FOR PUBLICATION  
*See* Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

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Appeal from the Superior Court in Cochise County  
No. CR201600195  
The Honorable Wallace R. Hoggatt, Judge

**AFFIRMED IN PART;  
VACATED IN PART**

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COUNSEL

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**MEMORANDUM DECISION**

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Staring and Chief Judge Vásquez concurred.

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BREARCLIFFE, Judge:

¶1 In this appeal from his convictions for two felony and three misdemeanor counts of cruelty to animals, Sha'ton Murdock challenges his sentences and terms of probation. The trial court sentenced Murdock to concurrent, presumptive prison terms of 1.75 years on the felony counts and placed Murdock on three-year terms of probation for each of the misdemeanor counts, to be completed consecutively to the prison terms and to one another. The court further ordered Murdock to pay two different restitution awards: \$1,986.54 to Smiling Dog Rescue<sup>1</sup> and \$1,090.40 to Sara Dent, a board member of Smiling Dog Rescue who attended court hearings in the case and testified at trial. We affirm the sentences, but vacate the restitution awarded to Dent.

**Issues**

¶2 On appeal, Murdock contends the trial court committed fundamental error when it ordered the terms of probation to be completed consecutively to each other and to his prison terms. Additionally, Murdock contends the court erred in ordering restitution to Dent. The state contends the sentences and terms of probation were appropriate and the restitution award proper. The issues on appeal are: 1) whether the conduct encompassed by the three misdemeanor counts was a single act rather than constituting multiple crimes such that consecutive sentences would be illegal; and 2) whether Dent suffered economic loss legally compensable by restitution.

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<sup>1</sup>The parties stipulated to the restitution awarded to Smiling Dog Rescue as reimbursement for amounts it paid to the treating veterinarian, and Murdock does not contest that award here.

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**Factual and Procedural History**

¶3 We view the facts in the light most favorable to sustaining the convictions. *See State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 2 (App. 2013). In December 2015, animal control officers in Cochise County received two different reports of injured dogs at the home of Marcetta Williams.<sup>2</sup> Murdock did not live with Williams at the time, but claimed ownership of the dogs. Animal control requested assistance from the Cochise County Sheriff's department, which obtained a warrant to search the property. When the warrant was executed, the sheriff's department seized ten dogs, each of which was either diseased, injured, or both, including some with bite and puncture wounds. The dogs were given to Smiling Dog Rescue, which transported the dogs to Tucson for treatment. Sara Dent, a board member of Smiling Dog Rescue, assisted. Veterinarian Dr. Harrison Nelson, director and owner of the Pet Doctor veterinary clinic, treated the dogs. Eight of the dogs were released the same day, but two—named Modelo and Matilda—had to remain for additional treatment.

¶4 Murdock was indicted on ten counts of felony animal cruelty. Counts seven through ten were dismissed before trial on the state's motion. Count four was dismissed at trial on the state's motion. The trial court granted Murdock's Rule 20, Ariz. R. Crim. P., motion for judgment of acquittal on felony counts three, five, and six, but permitted those charges to go to the jury as misdemeanors under A.R.S. § 13-2910(A)(1).

¶5 The jury found Murdock guilty on all remaining charges, and the trial court sentenced him as described above. This appeal followed. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, 13-4033(A)(4).

**Analysis**

**Consecutive Sentences**

¶6 Murdock contends that, because each count arose out of the same act, and because the animals involved are not people and thus cannot be "victims," the trial court erred in ordering consecutive probation terms to follow his prison sentences.<sup>3</sup> Murdock did not raise this objection in the

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<sup>2</sup>Williams was charged along with Murdock.

<sup>3</sup>Murdock does not argue, and we need not address, whether a probation term is a "sentence" for the purposes of A.R.S. § 13-116 because we reject his argument that his conduct constituted a single act.

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trial court, and therefore asks this court to review for fundamental error. A sentence that is outside the statutory range is unlawful. *State v. Provenzano*, 221 Ariz. 364, ¶ 18 (App. 2009). “Imposition of an illegal sentence constitutes fundamental error that may be reversed on appeal, despite the lack of an objection in the trial court.” *Id.* Consequently, if Murdock’s sentence was unlawful, the court committed fundamental error and the sentence must be vacated. *See id.*

¶7 It is within the trial court’s discretion to impose consecutive sentences. A.R.S. § 13-711(A) (“Except as otherwise provided by law, if multiple sentences of imprisonment are imposed on a person at the same time, the sentences imposed by the court may run consecutively or concurrently, *as determined by the court.*” (Emphasis added.)). That discretion is not unbounded, however. Under A.R.S. § 13-116:

An act or omission which is made punishable in  
different ways by different sections of the laws  
may be punished under both, but in no event  
may sentences be other than concurrent.

That is, a court may not impose consecutive sentences when conduct covered by multiple charges is deemed a “single act.” *Provenzano*, 221 Ariz. 364, ¶ 23.

¶8 Murdock claims that the trial court violated § 13-116 by making his terms of probation consecutive to his prison sentences as if the dogs were “victims,” but, he argues, animals are not victims but property. Irrespective of whether animals can be legal victims, the state argues that each count in the case, including the three misdemeanor counts, dealt with a different criminal act and therefore consecutive sentences were permissible. Murdock is correct that dogs are not “victims” because they are not people, but property. *See* Ariz. Const. art. II, § 2.1(C) (defining a “victim” as “a person against whom the criminal offense has been committed or, if the person is killed or incapacitated, the person’s spouse, parent, child or other lawful representative, except if the person is in custody for an offense or is the accused”), *see also Kaufman v. Langhofer*, 223 Ariz. 249, ¶ 10 (App. 2009) (classifying animals as “personal property”). But the analysis of the propriety of consecutive sentencing does not require discrete human victims; as the state asserts, it merely requires the commission of discrete crimes. *See generally State v. Gordon*, 161 Ariz. 308 (1989). The fact that certain criminal acts have discrete human victims simply makes that analysis easier. Nonetheless, contrary to Murdock’s argument, separate harms flowing from criminal conduct need not be

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suffered by human beings. *See State v. Martinez*, 226 Ariz. 221, ¶ 25 (App. 2011) (consecutive sentences for manufacturing and for possession of methamphetamine not improper because “[m]anufacturing poses dangers to neighbors and *the environment*, as well as to drug users themselves” and “[t]hese dangers go beyond those posed from simply selling the drugs” (Emphasis added.)).

¶9 Fundamentally, to determine whether criminal offenses constitute the same or separate acts for purposes of § 13-116, we do not compare the elements of the offenses but focus instead on “the facts of the transaction.” *State v. Price*, 218 Ariz. 311, ¶ 14 (App. 2008) (quoting *State v. Siddle*, 202 Ariz. 512, ¶ 17 (App. 2002)); *see also Gordon*, 161 Ariz. at 313 n.5. Murdock was charged with five discrete violations of law. Counts one and two were felony offenses under § 13-2910(A)(8), which provides that “[a] person commits cruelty to animals if the person . . . [i]ntentionally or knowingly subjects any animal under the person’s custody or control to cruel neglect or abandonment that results in serious physical injury to the animal.” Count one related to Murdock’s conduct toward dog Modelo and count two to his conduct toward dog Matilda. Counts three, five, and six were submitted to the jury as misdemeanor offenses under § 13-2910(A)(1), which states “[a] person commits cruelty to animals if the person . . . [i]ntentionally, knowingly or recklessly subjects any animal under the person’s custody or control to cruel neglect or abandonment.” “‘Cruel neglect’ means to fail to provide an animal with necessary food, water or shelter.” § 13-2910(H)(3). Count three related to Murdock’s conduct toward dog Lauren, count five his conduct toward dog Lina, and count six his conduct toward dog Errol.

¶10 The facts of the charges are distinct. The dog Modelo was found with infected puncture wounds and multiple lacerations, she was unable to walk, and was deemed to be in “critical condition” when treated by a veterinarian. When Matilda was found, she had wounds on her front legs and “almost severe” injuries to the back of her neck and skull, some of which were infected. She was similarly in critical condition when finally treated by a veterinarian.

¶11 As to the other dogs, Lauren was found in a kennel, with no food or water, standing in a pool of urine and feces, with multiple several-day-old puncture wounds on her legs. Lina and Errol were found in a separate pen together and, as with all of the animals at the property, had no access to food or water. Lina was thin, had weeks-old puncture wounds on her leg and other injuries to her neck and her ears, which were also tied with fishing line, with evidence of old bite wounds and scarring. Errol had

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crusty lesions on his body and old bite wounds on his face, his right eye was partially closed and swollen, all consistent with being “old fight wounds.”

¶12 Despite what may have been either simultaneous or substantially contemporaneous commission of the crimes, in looking at the “facts of the transaction,” Murdock’s criminal cruelty that resulted in serious physical injury to dogs Modelo and Matilda, and his criminal neglect of the dogs Lauren, Lina, and Errol constituted five discrete offenses. Murdock could have been cruelly neglectful to the dog Modelo resulting in his serious physical injuries without being cruelly neglectful to the dog Matilda and *vice versa*. Murdock’s failure to care for Modelo and to seek treatment for his injuries was unrelated to his failure to care for Matilda and to seek treatment for hers. Murdock similarly could have been cruelly neglectful to Lauren without being cruelly neglectful to Lina or Errol, and could have been cruelly neglectful to either of those even while not being so toward Lauren. His failure to provide food, water, and shelter to any one dog was unrelated to his failure to do so for others.

¶13 Had the trial court chosen to, it could have imposed consecutive sentences for each conviction. Because Murdock’s conduct was not a single act, the court’s imposition of consecutive terms of probation for counts three, five, and six, consecutive to the prison terms imposed for counts one and two, was not illegal under § 13-116 and did not constitute error, let alone fundamental error.

### **Restitution**

¶14 The trial court awarded Dent \$1,090.40 in restitution pursuant to A.R.S. § 13-804 for wages lost due to court attendance in the case. Section 13-804(A) provides:

On a defendant’s conviction for an offense causing economic loss to any person, the court, in its sole discretion, may order that all or any portion of the fine imposed be allocated as restitution to be paid by the defendant to any person who suffered an economic loss caused by the defendant’s conduct.

The court awarded Dent restitution on the ground that she represented the victims in the case, namely the dogs.

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¶15 At sentencing, Murdock objected to some but not all of the restitution award to Dent as “not reasonably necessary.” On appeal, Murdock objects to the award on the ground that Dent was not legally entitled to an award as a representative of the dogs. Because he raises this argument for the first time on appeal, Murdock asks us to review the award for fundamental error. *See State v. Escalante*, 245 Ariz. 135, ¶ 1 (2018). An illegal restitution award amounts to fundamental error. *State v. Whitney*, 151 Ariz. 113, 115 (App. 1985). Consequently, if the restitution award to Dent was illegal, it must be vacated. *See id.*

¶16 “The state has the burden of proving a restitution claim by a preponderance of the evidence.” *State v. Lewis*, 222 Ariz. 321, ¶ 7 (App. 2009). As noted above, it is within the trial court’s “sole discretion” whether to award restitution, and it may award restitution to someone other than the victim of a crime. A.R.S. § 13-804(A). Indeed, a crime *without* a victim “may still support an award of restitution so long as the criminal act directly results in economic damages to the person or entity receiving the award.” *State v. Guilliams*, 208 Ariz. 48, ¶ 14 (App. 2004).

¶17 “A loss is recoverable as restitution if it meets three requirements: (1) the loss must be economic, (2) the loss must be one that the victim would not have incurred but for the criminal conduct, and (3) the criminal conduct must directly cause the economic loss.” *Lewis*, 222 Ariz. 321, ¶ 7 (quoting *State v. Madrid*, 207 Ariz. 296, ¶ 5 (App. 2004)). For the first requirement, “[e]conomic loss” means any loss incurred by a person as a result of the commission of an offense” and “includes lost interest, lost earnings and other losses that would not have been incurred but for the offense.” A.R.S. § 13-105(16). It does not include “losses incurred by the convicted person, damages for pain and suffering, punitive damages or consequential damages.” *Id.*

¶18 As to the second requirement, the claimant must show not only that his or her “particular loss would not have occurred but for the conduct underlying the offense of conviction, but also that the causal nexus between the conduct and the loss is not too attenuated (either factually or temporally).” *Guilliams*, 208 Ariz. 48, ¶ 18 (quoting *U.S. v. Vaknin*, 112 F.3d 579, 589-90 (1st Cir. 1997), *abrogated on other grounds by U.S. v. Anonymous Defendant*, 629 F.3d 68 (1st Cir. 2010)). The third requirement is that “the criminal conduct must directly cause the economic loss,” *Lewis*, 222 Ariz. 321, ¶ 7 (quoting *Madrid*, 207 Ariz. 296, ¶ 5), and the loss must flow from the defendant’s conduct “without the intervention of additional causative factors,” *Guilliams*, 208 Ariz. 48, ¶ 17 (quoting *State v. Wilkinson*, 202 Ariz.

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27, ¶ 7 (2002)). If the third prong is lacking, “then the loss is considered a non-recoverable, consequential damage.” *Madrid*, 207 Ariz. 296, ¶ 5.

¶19 The restitution to Dent was to compensate her for the lost wages she suffered by attending court proceedings. Division One of our court held in *State v. Wideman* that losses representing expenses for a victim’s family to attend court hearings were not a “direct result of the defendant’s crime.” 165 Ariz. 364, 369 (App. 1990). In that case, the defendant was convicted of first-degree murder. *Id.* at 365. The trial court ordered restitution to the family of the victim for the travel expenses incurred in attending trial. *Id.* at 366. On appeal, we stated while we “sympathize[d] with the victim’s family’s desire to attend the[] hearings . . . this was a matter of choice and not an economic loss caused by defendant’s crime.” *Id.* at 369. We determined the expenses were “consequential” damages not recoverable as restitution. *Id.*

¶20 After *Wideman*, Arizona voters approved the Victims’ Bill of Rights<sup>4</sup> which provides a crime victim the right, among others, “[t]o be present at . . . all criminal proceedings where the defendant has the right to be present.” Ariz. Const. art. II, § 2.1(A)(3). As a result, in *State v. Lindsley*, 191 Ariz. 195 (App. 1997) and in *Madrid*, 207 Ariz. 296, we declined to follow our holding in *Wideman*. In *Lindsley*, the defendant was convicted of forgery, possession of marijuana, and possession of drug paraphernalia after stealing a wallet. 191 Ariz. at 196. The trial court ordered her to pay restitution to the owner of the wallet for the lost wages she had incurred for voluntarily attending the defendant’s trial. *Id.* We upheld the order in light of the Victims’ Bill of Rights, determining that “[t]o deny a victim the right to reimbursement for wages lost in attending court proceedings which he or she may attend by right would be tantamount in some instances to denying that individual the opportunity to exercise that right,” regardless of whether the victim’s appearance was voluntary or made under subpoena. *Id.* at 199.

¶21 Similarly, in *Madrid*, the defendant, who was convicted of first-degree murder, was ordered to pay restitution to the county attorney’s office for disbursements it made to the victim’s family to cover the cost of attending the trial. 207 Ariz. 296, ¶¶ 1-2. The defendant argued the victim’s children attended the trial voluntarily and thus were not entitled to restitution. *Id.* ¶ 3. We determined that a victim’s constitutional right to attend criminal proceedings was not an “additional causative” factor

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<sup>4</sup>Ariz. Const. art. II, § 2.1 and codified in A.R.S. §§ 13-4401 to 4437.



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precluding recovery, and the expenses related to voluntary attendance at trial constituted “an economic loss for which [the victims were] entitled to restitution.” *Id.* ¶ 10.

¶22        However, the instant case is distinguishable from both *Lindsley* and *Madrid* in that Dent is not a victim. Section 13-4401(19), A.R.S., defines a “victim” as “a person *against whom* the criminal offense has been committed,” or, if that person has been “killed or incapacitated, the person’s spouse, parent, child, grandparent or sibling, any other person related to the person by consanguinity or affinity to the second degree or any other lawful representative of *the person*.” (Emphasis added.) Murdock did not commit any offense against Dent, but rather, against his own property – the dogs. As such, the reasoning in *Lindsley* and *Madrid* is inapplicable. Therefore, we conclude that, similar to *Wideman*, Dent’s attendance at Murdock’s hearings was not a direct result of Murdock’s conduct. Thus, the costs associated with Dent’s attendance are consequential damages unrecoverable as restitution, and therefore the trial court’s award of restitution was illegal.

**Disposition**

¶23        Because Murdock’s conduct constituted separate acts, the trial court did not err in imposing consecutive terms of probation. We therefore uphold Murdock’s consecutive probationary terms. However, because the losses Dent incurred by attending Murdock’s hearings are unrecoverable consequential damages, we vacate the \$1,090.40 in restitution awarded to Dent.